

THE HONORABLE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

JOSEPH JEROME WILBUR, a Washington resident; JEREMIAH RAY MOON, a Washington resident; and ANGELA MARIE MONTAGUE, a Washington resident, individually and on behalf of all others similarly situated,

Plaintiffs,

V.

CITY OF MOUNT VERNON, a Washington municipal corporation; and CITY OF BURLINGTON, a Washington municipal corporation,

Defendants.

NO. 2:11-cv-01100 RSL

**PLAINTIFFS' MOTION FOR AWARD
OF ATTORNEYS' FEES AND
EXPENSES**

**NOTE ON MOTION CALENDAR:
January 3, 2013**

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

This class action lawsuit has been, and will long continue to be, a case of exceptional importance. At issue was the fundamental right to the assistance of counsel that is guaranteed under the Sixth Amendment of the United States Constitution. Plaintiffs proved at trial that thousands of indigent defendants in the Cities of Mount Vernon and Burlington have been systematically deprived of this right. Plaintiffs also proved that the deprivation has been directly and predictably caused by the deliberate choices of the Cities' municipal policymakers. The Court's decision to remedy the constitutional violations through substantial injunctive relief greatly amplifies the notes of freedom and liberty that emerged from Gideon's trumpet a half a century ago, and it does so at a critical time. As Attorney General Eric Holder recently noted, "America's indigent defense systems continue to exist in a state of crisis."¹ The important ruling delivered by the Court in this case will undoubtedly reverberate far beyond the Cities' borders, helping to raise public defense standards so that indigent defendants across the nation get the assistance of counsel to which they are entitled.²

Plaintiffs and their attorneys achieved what they set out to do, but the path to success was long and there were considerable obstacles along the way. The Cities aggressively defended their illegal conduct and refused several good-faith attempts to resolve the case through compromise. As a result, it was necessary for Class Counsel to rigorously and thoroughly prosecute the action and ultimately prove Plaintiffs' claims at trial. The stakes demanded an in-depth investigation of the facts, an extensive review of the law, the marshaling of substantial evidence, and the presentation of numerous witnesses. Throughout the entire process, Class Counsel worked as efficiently as possible and had no incentive to waste time on

¹ Eric Holder, United States Attorney General, Remarks at the Annual Meeting of the American Bar Association's House of Delegates (August 12, 2013) (transcript available at <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html>); see also Statement of Interest of the United States, Dkt. No. 322 at 4:17 ("Our national difficulty to meet the obligations recognized in *Gideon* is well documented.").

² See, e.g., Jesse Wegman, Editorial Page Editor's Blog, *The Right to an Attorney Who Actually Does His Job*, N.Y. Times, December 9, 2013 (available at <http://takingnote.blogs.nytimes.com/2013/12/09/the-right-to-an-attorney-who-actually-does-his-job/?hp&rref=opinion>).

unnecessary endeavors. For the reasons set forth below, the attorneys' fees and litigation expenses that Class Counsel incurred and seek to recover are reasonable and fair, particularly in light of the circumstances of the litigation and the extraordinary outcome achieved.

Accordingly, Plaintiffs respectfully move as the prevailing parties for an award to Class Counsel of \$2,425,916.52 in attorneys' fees and \$43,496.50 in litigation expenses, which shall be paid by the Cities. The motion is brought under 42 U.S.C. § 1988 and Civil Rules 23(h) and 54(d)(2) and is based on the Court's December 4, 2013 Memorandum of Decision.

II. FACTUAL BACKGROUND

In August 2010, attorneys Matt Zuchetto and Toby Marshall started researching and analyzing the systemic problems that have long plagued indigent defense systems and efforts to create reform through litigation. Marshall Decl. ¶ 25. The attorneys focused their investigation on the joint public defense system in Mount Vernon and Burlington. *Id.* Through public records requests, observations of court proceedings, and interviews with numerous individuals, Messrs. Zuchetto and Marshall determined that deprivations of the right to counsel were widespread and ongoing. *Id.* Thus, in June 2011 the attorneys filed this lawsuit in Skagit County Superior Court on behalf of Plaintiffs and a proposed class of indigent defendants, seeking declaratory and injunctive relief under 42 U.S.C. § 1983. *See* Dkt. No. 1-1, Ex. A. The Cities subsequently removed the case to this Court. Dkt. No. 1.

Shortly after the action was filed, the ACLU of Washington and its cooperating attorneys at Perkins Coie offered to join Messrs. Zuchetto and Marshall and their firms in representing the Plaintiffs and proposed class members. Marshall Decl. ¶ 26. The ACLU and Perkins Coie had successfully litigated a class action against Grant County over indigent defense rights, and Messrs. Zuchetto and Marshall knew the organizations could provide substantial experience, expertise, and resources. *Id.* Thus, Messrs. Zuchetto and Marshall accepted the offer to co-counsel on this important case. *Id.*

Within three weeks of filing the case, Plaintiffs' counsel sent a letter to opposing

1 counsel offering to enter into early mediation with the Cities. Marshall Decl. ¶ 27. The Cities
 2 failed to respond. *Id.* Plaintiffs' counsel raised the issue again during the Rule 26(f)
 3 conference, noting that the fees and expenses in an action of this magnitude would likely be
 4 great if the matter proceeded to judgment, but the Cities stated that they intended to litigate the
 5 case extensively and would not address mediation until after summary judgment and class
 6 certification issues were resolved. Dkt. No. 10 at 3:4-24. The Cities also asserted that they
 7 may simply choose to shut down their municipal courts rather than face an injunctive order
 8 from this Court, thereby setting the tone for their approach to the lawsuit. *Id.*

9 Approximately one month after the filing of the parties' joint status report, the Cities
 10 made good on their intention to aggressively defend against Plaintiffs' claims. The Cities filed
 11 three separate summary judgment motions, each over 30 pages in length. *See* Dkt. Nos. 25-34.
 12 Five weeks later, the Cities filed a motion for sanctions against Joseph Wilbur and a motion to
 13 disqualify Plaintiffs' counsel and their experts for alleged violations of the Rules of
 14 Professional Conduct. *See* Dkt. Nos. 87-90. Plaintiffs' counsel successfully defeated all of
 15 these motions, but doing so required substantial evidence, testimony, and briefing. *See* Dkt.
 16 Nos. 45-57, 93-106, 140, 142, 144 (noting "defense counsel had only a weak factual basis" for
 17 the motion to disqualify, apparently acted "for tactical reasons," and "arguably overstep[ed] the
 18 bounds of zealous advocacy"). Around the same time, Plaintiffs' counsel successfully moved
 19 for class certification in the face of considerable opposition. *See* Dkt. Nos. 124-27, 143.

20 With the class certified and summary judgment denied, the case moved toward trial.
 21 Extensive discovery was conducted by both sides, including eighteen depositions and the
 22 production of thousands of pages of documents. Marshall Decl. ¶ 28. The work required of
 23 Class Counsel to gather evidence for the prosecution of the case increased substantially when
 24 the Cities made changes to their public defense system and argued those changes had rendered
 25 the Class claims moot. *Id.*; *see also* Dkt. No. 218 at 1:14-16. Indeed, Class Counsel were
 26 required to gather and present evidence on two different sets of public defenders. Marshall

1 Decl. ¶ 28. At the close of discovery, Defendants filed a motion for summary judgment on that
 2 ground, but Plaintiffs demonstrated there were genuine issues for trial. *See* Dkt. No. 271.

3 After class certification was granted and again before trial, Class Counsel worked hard
 4 to obtain a resolution of the case through settlement and made substantial offers of
 5 compromise. Marshall Decl. ¶ 29. The Cities rejected the offers and chose to take their
 6 chances on a trial. *See id.*

7 The case was tried during nine Court days in June 2013. Marshall Decl. ¶ 30. Thirty
 8 witnesses were called to testify and hundreds of exhibits were offered into evidence. *Id.* Post-
 9 trial briefing on key issues was submitted in August per the Court's request. *Id.* On December
 10 4, 2013, the Court issued a memorandum of decision. Dkt. No. 325. The Court declared that
 11 indigent defendants in Mount Vernon and Burlington are systemically deprived of the
 12 assistance of counsel and that the Cities' municipal policymakers have made deliberate choices
 13 regarding the funding, contracting, and monitoring of the public defense system that directly
 14 and predictably caused the deprivation. *Id.* at 2:8-12. The Court ordered substantial injunctive
 15 relief to remedy the constitutional violations and restore the rights of the Class. *Id.* at 17-23.

16 III. ARGUMENT AND AUTHORITY

17 A. Plaintiffs Are the Prevailing Parties

18 The prevailing party in a civil rights suit is entitled to an award of reasonable attorneys'
 19 fees and out-of-pocket expenses. 42 U.S.C. § 1988(b) (fees); *Harris v. Marhoefer*, 24 F.3d 16,
 20 19-20 (1994) (expenses). In reviewing section 1988 fee awards, the United States Supreme
 21 Court has noted:

22 Congress expressly recognized that a plaintiff who obtains relief in a
 23 civil rights lawsuit does so not for himself alone but also as a 'private
 24 attorney general,' vindicating a policy that Congress considered of the
 25 highest importance [Thus,] [c]ounsel for prevailing parties should
 26 be paid . . . for all time reasonably expended on [the] matter.

City of Riverside v. Rivera, 477 U.S. 561, 574-75 (1986) (quotation marks and citations
 omitted); *see also Leeds v. Watson*, 630 F.2d 674, 677 (9th Cir. 1980) (section 1988 "was

designed to provide for awards of attorney fees in ‘private attorney general’ types of claims in order to encourage the private enforcement of civil rights laws and to fully vindicate” those rights); *Ackerley Commc ’ns v. City of Salem*, 752 F.2d 1394, 1396-97 (9th Cir. 1985) (awards of attorneys’ fees “act as an effective incentive for injured parties to seek judicial relief for civil rights violations” and “stimulate voluntary compliance with the law”) (quoting *Seattle Sch. Dist. No. 1 v. Washington*, 633 F.2d 1338, 1348 (9th Cir. 1980)).

A plaintiff “prevails” for purposes of section 1988 if there is a “material alteration of the parties’ legal relationship” that “is accompanied by ‘judicial imprimatur on the change.’” *Higher Taste, Inc. v. City of Tacoma*, 717 F.3d 712, 715 (9th Cir. 2013) (quoting *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 605 (2001)). An order granting injunctive relief satisfies this requirement. See *Gerling Global Reinsurance Corp. of Am. v. Garamendi*, 400 F.3d 803, 806, 811 (9th Cir. 2005). Because the Court ordered substantial injunctive relief to the Class to remedy the Cities’ constitutional violations, Plaintiffs are the prevailing parties in this lawsuit and are entitled an award of reasonable fees and litigation expenses. See Dkt. No. 325 at 17-23.

B. Class Counsel Are Entitled to an Award of Reasonable Attorneys’ Fees and Expenses Incurred in This Action

1. The Lodestar Establishes a Presumptively Reasonable Fee

“In determining a reasonable attorney’s fee, the district court’s first step is to calculate a ‘lodestar’ by multiplying the number of hours it finds the prevailing party reasonably expended on the litigation by a reasonable hourly rate.” *McGrath v. County of Nev.*, 67 F.3d 248, 252 (9th Cir. 1995); *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). There is a “strong presumption” that the lodestar amount constitutes a “reasonable” fee. *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 553-54 (2010). Thus, “it should only be enhanced or reduced in ‘rare and exceptional cases.’” *Fischer v. SJB-P.D. Inc.*, 214 F.3d 1115, 1119 n.4 (9th Cir. 2000) (quoting *Pennsylvania v. Del. Valley Citizens’ Council for Clean Air*, 478 U.S. 546, 565 (1986)); see also *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975) (factors).

1 2. Class Counsel's Hourly Rates Are Reasonable

2 Submitted in support of this motion are the declarations of Toby Marshall, Matthew
 3 Zuchetto, Sarah Dunne, and James Williams. Those declarations set forth the skill, experience,
 4 rates, hours worked, work performed, and need for time expended by each attorney and staff
 5 member that worked for Class Counsel on this matter. *See* Marshall Decl. ¶¶ 2-20; Zuchetto
 6 Decl. ¶¶ 2-15; Dunne Decl. ¶¶ 2-15; Williams Decl. ¶¶ 2-12. Nearly all of the work performed
 7 in prosecuting this case was accomplished by the following individuals, and Class Counsel seek
 8 fees at the current hourly rates noted for each: Toby Marshall, attorney (\$375); James
 9 Williams, attorney (\$580); Matt Zuchetto, attorney (\$330); Breena Roos, attorney (\$465);
 10 Camille Fisher, attorney (\$330); Jennifer Boschen, paralegal (\$150); Nancy Talner, attorney
 11 (\$400); Sarah Dunne, attorney (\$380); and Joel Higa, paralegal (\$155).³

12 For purposes of the lodestar determination, reasonable fees are “calculated according to
 13 the prevailing market rates in the relevant community, regardless of whether the plaintiff is
 14 represented by private or nonprofit counsel.” *Blum v. Stenson*, 465 U.S. 886, 895 (1984). “The
 15 relevant community is generally defined as the forum in which the district court sits.” *Van*
 16 *Skike v. Dir., Office of Workers’ Comp. Programs*, 557 F.3d 1041, 1046 (2009) (quotation
 17 marks and citation omitted). Thus, in assessing the rates requested by Class Counsel, the Court
 18 should look to market rates in the Western District of Washington.

19 “[A]ffidavits of the plaintiffs’ attorneys and other attorneys regarding prevailing fees in
 20 the community and rate determinations in other cases are satisfactory evidence of the prevailing
 21 market rate.” *Camacho v. Bridgeport Fin., Inc.*, 523 F.3d 973, 980 (9th Cir. 2008) (internal
 22 marks omitted; quoting *United Steelworkers of Am. v. Phelps Dodge Corp.*, 896 F.2d 403, 407

23 ³ The application of current rates (as opposed to historical rates) throughout the case is an appropriate adjustment
 24 because it compensates Class Counsel for the substantial delay in payment for work performed in this case. *See* *Perdue*, 559 U.S. at 556; *see also Gates v. Deukmejian*, 987 F.2d 1392, 1406 (9th Cir. 1992) (“We have long
 25 recognized that district courts have the discretion to compensate prevailing parties for any delay in the receipt of
 26 fees by awarding fees at current rather than historic rates in order to adjust for inflation and loss of the use [of]
 funds.”). Indeed, the Ninth Circuit has noted that a delay of “over three years” from counsel’s initial work is
 “particularly onerous” where the fees ultimately incurred “run[] in the millions of dollars.” 987 F.2d at 1406-07.
 That is precisely the situation here.

(9th Cir. 1990)). As set forth in the declarations accompanying this motion, the rates Class Counsel request are consistent with rates charged by other lawyers in this community of similar skill and experience. Marshall Decl. ¶ 16; Zuchetto Decl. ¶¶ 6-7; Dunne Decl. ¶ 2; Williams Decl. ¶ 12. Indeed, three well-respected and experienced practitioners from Seattle—Bradley Keller, Sal Mungia, and Joseph Shaeffer—attest as experts that Class Counsel’s rates are comparable to prevailing rates in the Seattle community. Keller Decl. ¶¶ 6-9; Mungia Decl. ¶ 3-10; Shaeffer Decl. ¶¶ 7-12. Recent awards in western Washington also show the rates requested are reasonable. Marshall Decl. ¶¶ 21-22; Zuchetto Decl. ¶¶ 6-7.

3. The Time Class Counsel Spent Prosecuting This Case and Obtaining a Successful Outcome Was Reasonable

Class Counsel have filed detailed documentation of the time they spent investigating, litigating, and trying this case. Summaries of the hours worked by timekeeper, including applicable current rate and total fees, are provided in accompanying declarations. Marshall Decl. ¶ 20; Zuchetto Decl. ¶ 11; Dunne Decl. ¶ 15. Also provided as Appendix A to this motion is a consolidated spreadsheet that describes the tasks performed by every timekeeper on a daily basis and the number of hours spent on those tasks. Class Counsel compiled this spreadsheet from contemporaneously created time records. Marshall Decl. ¶ 16; Zuchetto Decl. ¶¶ 13-14; Dunne Decl. ¶ 14; Williams Decl. ¶ 10. With respect to work performed on the case up until this motion, Class Counsel respectfully seek payment of \$2,396,423.52 in fees.

Successfully prosecuting an indigent defense reform case is notoriously difficult. See Cara H. Drinan, *The National Right to Counsel Act: A Congressional Solution to the Nation’s Indigent Defense Crisis*, 47 Harvard Journal on Legislation 487, 522 (2010) (“lawsuits raising systemic deprivations of the right to counsel . . . have not been consistently successful in state court, and they have been almost entirely unsuccessful in federal court”). Such cases typically involve challenging and complex issues of justiciability, mootness, section 1983 liability, and injunctive relief. See, e.g., William H.W. McKenna, *The Gideon Split: Preconviction Indigent Defense Reform Litigation in Hurrell-Harring and Duncan*, 45 U.C. Davis L. Rev. 193, 202-11

1 (2011); *Hurrell-Harring v. State*, 930 N.E.2d 217, 220-27 & n.5 (N.Y. 2010). It is obvious that
 2 few lawyers have experience litigating actions involving systemic Sixth Amendment violations.
 3

4 Despite the substantial risks presented to their firms, Matt Zuchetto and Toby Marshall
 5 endeavored to pursue Plaintiffs' claims on a contingent fee basis after a thorough investigation
 6 of the Cities' public defense system uncovered systemic and chronic violations of the right to
 7 counsel. Marshall Decl. ¶¶ 24-25. Once the case was filed, the ACLU of Washington and its
 8 cooperating attorneys at Perkins Coie offered to join in the representation, agreeing to the same
 9 substantial risks and bringing with them significant experience and resources.⁴ *Id.* ¶ 26. For
 10 example, attorneys Nancy Talner of the ACLU and Breena Roos of Perkins Coie had
 11 previously litigated one of the few successful indigent defense cases brought in state court and
 12 obtained a settlement after achieving class certification and partial summary judgment. *Id.*

13 From the outset, Class Counsel offered to discuss a resolution of the matter through
 14 compromise and settlement, but the offers were rejected. Marshall Decl. ¶¶ 27, 29. The Cities
 15 chose instead to vigorously defend their unlawful practices, and the positions they took
 16 compounded the hours required to prosecute the Class claims. *Id.* The Cities maintained
 17 throughout the case and during trial that their public defense system met constitutional
 18 standards for the right to counsel, even when two part-time attorneys were handling more than
 19 1,000 cases each. Indeed, rather than address the problems detailed in Plaintiffs' complaint and
 20 the briefing before the Court, the Cities went in the opposite direction—for example, amending
 21 "ordinance[s] related to the provision of public defender services" in order to "remov[e] what
 22 little 'teeth' the previous ordinances had." Dkt. No. 325 at 15:23 –16:2.

23 After a full trial on the merits, this Court declared that the certified Class of "indigent
 24 criminal defendants in Mount Vernon and Burlington are systematically deprived of the
 25 assistance of counsel at critical stages of the prosecution and that municipal policymakers have

26 ⁴ Perkins Coie agreed to assist the ACLU of Washington on a pro bono basis. The Ninth Circuit has held that
 attorneys' fees should be paid for pro bono work in civil rights cases. *See United States v. \$12,248 U.S. Currency*,
 957 F.2d 1513 (9th Cir. 1991) (affirming trial court's determination that award of fees for pro bono work "truly
 serves the public policy rationale" of civil rights fee-shifting statute).

1 made deliberate choices regarding the funding, contracting, and monitoring of the public
 2 defense system that directly and predictably caused the deprivation.” Dkt. No. 325 at 2:8-12.
 3 The Court also granted significant and extensive injunctive relief that, among other things,
 4 ordered the Cities to “re-evaluate their existing contract for the provision of public defense,” to
 5 “hire one part-time Public Defense Supervisor to work at least twenty hours per week,” to
 6 periodically provide randomly selected case files to Class Counsel “so that they may evaluate
 7 the Cities’ compliance” with the Court’s order. *Id.* at 18:16-21, 19:2-3, 22:14-17. The Public
 8 Defense Supervisor will oversee and evaluate the Cities’ public defense system, tracking and
 9 analyzing numerous subjective and objective factors and reporting every six months to Class
 10 Counsel. *Id.* at 19:15 – 22:13. The Court will maintain jurisdiction over the case for three
 11 years so that Class Counsel may seek additional relief if necessary. *Id.* at 22:17-19.

12 Class Counsel achieved an excellent result in this lawsuit. Preparing for and navigating
 13 the many defenses to this successful outcome required great skill, knowledge, experience, and
 14 hard work. Accordingly, Class Counsel are entitled to the requested fees.

15 4. Class Counsel Have Exercised Billing Judgment and Reduced Their Fees
 16 Appropriately to Exclude Any Unnecessary Duplication or Inefficiency

17 A court may reduce the overall number of hours only when it makes specific findings
 18 that the work performed was “unnecessarily duplicative.” *Moreno v. City of Sacramento*, 534
 19 F.3d 1106, 1113 (9th Cir. 2008) (emphasis in original). “One certainly expects some degree of
 20 duplication as an inherent part of the process. There is no reason why the lawyer should
 21 perform this necessary work for free.” *Id.* at 1112 (emphasis in original). A court should be
 22 particularly reluctant to reduce hours for duplication where, as here, counsel handled the matter
 23 on a contingency fee basis. *Id.* As the Ninth Circuit has noted, “lawyers are not likely to spend
 24 unnecessary time on contingency cases in the hope of inflating their fees. The payoff is too
 25 uncertain, as to both the result and the amount of the fee.” *Id.* Thus, “[b]y and large, the court
 26 should defer to the winning lawyer’s professional judgment as to how much time was required
 to spend on the case; after all, he won, and might not have, had he been more of a slacker.” *Id.*

1 Class Counsel took care to best utilize the various talents of the lawyers and staff
 2 involved to efficiently manage and prosecute this case. Nevertheless, in computing their
 3 lodestar amount Class Counsel carefully exercised billing judgment and made reductions where
 4 time arguably could have been more efficiently spent. Marshall Decl. ¶¶ 17-18; Zuchetto Decl.
 5 ¶ 19; Dunne Decl. ¶ 14. As a result, the fees sought by Terrell Marshall Daudt & Willie PLLC
 6 represent a reduction of 3.5 percent from the firm's recorded time on the matter; the fees sought
 7 by The Scott Law Group, P.S. represent a reduction of 3.3 percent from the firm's recorded
 8 time on the matter; and the fees sought by the ACLU-WA for itself and its cooperating
 9 attorneys represent a reduction of 29 percent from the time recorded on the matter. Marshall
 10 Decl. ¶ 18; Zuchetto Decl. ¶¶ 15, 19; Dunne Decl. ¶ 14. Thus, Class Counsel's fee request is a
 11 conservative lodestar (less than 82 percent of actual recorded time) based on work that was
 12 reasonably and necessarily expended to secure the constitutional rights of the Class.⁵

13 5. The Time Class Counsel Spent Preparing This Motion Was Reasonable

14 Time spent establishing the right to a fee award is compensable. *Camacho*, 523 F.3d at
 15 981-82. In determining these additional fees, the Court applies the same lodestar analysis
 16 outlined above. *Id.* at 982. A discount or flat-fee award is inappropriate, particularly where the
 17 attorneys preparing the application have experience putting together such requests. *Id.*

18 As set forth in the declarations of Marshall, Zuchetto, and Dunne and detailed in
 19 Appendix C to this motion, the fees incurred in preparing this motion and the accompanying
 20 submissions were reasonable and necessary. Marshall Decl. ¶ 31; Zuchetto Decl. ¶ 12; Dunne
 21 Decl. ¶ 14. Thus, Class Counsel are entitled to an award that includes those fees, which
 22 currently amount to \$29,493.00.⁶

24

⁵ Class Counsel will incur additional fees for work performed in this case, including work associated with
 25 reviewing the Public Defense Supervisor's biannual reports and the Cities' production of randomly selected case
 26 files. *See* Dkt. No. 325 at 22:1-24. Because it is not possible at this time to estimate the extent of this work, Class
 Counsel reserve the right to move for additional fees in the future.

⁶ If the Cities object to or oppose either motion, Class Counsel will incur additional fees for the preparation of a
 reply. In that event, Class Counsel will revise the amount requested.

1 **C. Class Counsel Are Entitled to Recover Reasonable Litigation Expenses**

2 Under section 1988 and Rule 54(d)(1), Plaintiffs “may recover as part of the award of
 3 attorney’s fees those out-of-pocket expenses that ‘would normally be charged to a fee paying
 4 client.’” *Harris*, 24 F.3d at 20 (quoting *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1216
 5 n.7 (9th Cir. 1986)) (approving recovery of expenses such as “service of summons and
 6 complaint, service of trial subpoenas, fee for defense expert at deposition, postage, investigator,
 7 copying costs, hotel bills, meals, messenger service and . . . record reproduction”). The
 8 reasonable expenses incurred in this litigation (other than taxable costs being sought separately
 9 under 28 U.S.C. § 1920) are summarized in the declarations of Class Counsel and consolidated
 10 for the Court’s reference as Appendix B to this motion.⁷ See Marshall Decl., ¶ 23; Zuchetto
 11 Decl. ¶ 20; Dunne Decl. ¶ 16; Williams Decl. ¶ 13. These expenses are the type of expenses
 12 customarily charged to and paid by hourly clients. Thus, Class Counsel are entitled to an award
 13 reimbursing them for those expenses, which total \$43,496.50.

14 **D. It Is Unnecessary to Provide Notice of This Motion to the Class**

15 Rule 23 provides that in a certified class action, the district court may award reasonable
 16 attorneys’ fees and nontaxable expenses as authorized by law. Fed. R. Civ. P. 23(h). The
 17 claim for any such award must be made by motion under Rule 54(d)(2). Fed. R. Civ. P.
 18 23(h)(1). The motion is usually “directed to class members in a reasonable manner.” *Id.* “In
 19 adjudicated class actions,” however, “the court may calibrate the notice to avoid undue
 20 expense.” Fed. R. Civ. P. 23 advisory committee’s note (2003).

21 Class Counsel searched case law for interpretations of the notice provision and
 22 comments by the advisory committee, but the effort was to no avail. Two secondary sources
 23 briefly address the issue, and both suggest that notice can be avoided altogether in certain
 24 situations. See 3 William B. Rubenstein, *Newberg on Class Actions* § 8:23 (5th ed. 2013)

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⁷ To the extent any of the taxable costs requested in Plaintiffs’ Motion for Costs are denied, Plaintiffs respectfully
 request that those costs be awarded as non-taxable litigation expenses. The costs sought as taxable are detailed
 and supported in the declarations accompanying Plaintiffs’ Motion for Costs.

1 (finding advisory committee's "rather cryptic statement likely reflects the . . . conclusion that in
 2 the rare case that is actually adjudicated, the court has a strong sense of counsel's contributions
 3 and is better situated to monitor the fee award itself, hence lessening the need [for notice]");
 4 Manual for Complex Litigation (Fourth) § 21.722 (2013) (notice is necessary "in cases
 5 involving settlement review" but may be unnecessary in "adjudicated class actions").

6 For several reasons, notice to the Class of this motion is unnecessary. First, the Court
 7 certified the case under Rule 23(b)(2), which—in contrast to Rule 23(b)(3)—does not require
 8 notice. *See* Dkt. No. 143 at 7:7-16; Fed. R. Civ. P. 23(c)(2)(A). Second, no monetary relief
 9 was sought, and an award of fees and expenses will have to be paid by the Cities rather than
 10 from a common fund to which the Class would otherwise be entitled. Third, the case was fully
 11 adjudicated and the Class obtained complete declaratory and injunctive relief; thus, there is no
 12 possibility of a conflict between the interests of the Class and those of Class Counsel.

13 Plaintiffs respectfully ask the Court to hold that notice is unnecessary under these
 14 circumstances. The general purpose of notice is to allow class members an opportunity to
 15 object, and here there are no grounds for such an objection. If the Court finds notice must be
 16 sent, Plaintiffs respectfully ask the Court to order the Cities to pay all expenses associated with
 17 publishing notice in a local newspaper or by other means that the Court deems appropriate.⁸

18 IV. CONCLUSION

19 "Where a plaintiff has obtained excellent results, his attorney should recover a fully
 20 compensatory fee." *Hensley*, 461 U.S. at 435 ("The result is what matters."). Here, Plaintiffs
 21 have secured substantial and significant injunctive relief that ensures thousands of indigent
 22 defendants will receive the right to counsel provided for under the Sixth Amendment of the
 23 United States Constitution. Accordingly, Plaintiffs respectfully request an award to Class
 24 Counsel of \$2,425,916.52 in attorneys' fees and \$43,496.50 in litigation expenses.

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 26 ⁸ If notice is deemed necessary, the language and form of the publication should be mutually approved by the
 parties or approved by the Court. The notice should issue within three weeks of the Court's order and should
 allow Class members at least 30 days in which to submit objections. A fairness hearing should be scheduled on
 the motion for fees and expenses, and the date, time, and location of that hearing should be included in the notice.

1 DATED this 18th day of December, 2013.
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PLAINTIFFS' MOTION FOR AWARD OF ATTORNEYS'
FEES AND EXPENSES - 14
CASE NO. 2:11-CV-01100 RSL

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CERTIFICATE OF SERVICE

I, Toby J. Marshall, hereby certify that on December 18, 2013, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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1 DATED this 18th day of December, 2013.
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